JUSTICE IN AFRICA: RECENT DEVELOPMENTS FROM AN INTERNATIONAL PERSPECTIVE

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Debating justice in Africa involves unavoidable quandaries: i. the colonising features of national justice systems; ii. the inescapable paradigm of judicial independence; iii. the dilemma of alternatives to international justice; iv. the undeniable progress in human rights justice; v. the clash of judges; and vi. transnational justice and new crimes.

THE COLONISING FEATURES OF NATIONAL JUSTICE SYSTEMS

Are the national judicial systems of most African countries inward or outward-shaped in their formation and philosophy? It is obvious that in the so-called Portuguese, Arabic, English or French-speaking Africa, while the judiciary is established by the constitution, and its independence is enshrined therein, the laws governing its operation are adopted by the national legislative bodies of sovereign states. The same laws were equally designed by leading African practitioners of regional and international repute. In addition, the justice systems established thereon are run by Africans trained mainly in Africa, in particular in law schools or specialised institutions, including schools for judicial training.

While the expertise of those who designed and led the continent's judicial systems is beyond dispute, the same cannot be said of the decolonisation of justice and the judiciary in Africa. The informed observer cannot but note that the decolonisation of African states has largely remained at an embryonic stage. Moreover, the debate on the decolonisation of judicial systems is in its infancy, with the exception of post-colonial academia from Anglo-Saxon spheres of the continent. Yet African states own the processes that shape their judicial policies.

Discussing related issues requires the understanding that, in order to conceive decolonisation, it is necessary to have dissected colonisation. We can deny it as much as we want, but national legal systems in Africa are a legacy of colonisation. The political decolonisation of the 1960s barely affected such reality. In the so-called Francophone Africa, the unified, fragmented, reunified and readjusted reforms of the judiciary, from supreme courts structured in chambers to supreme administrative, judicial, audit, and constitutional courts or councils, are a clear illustration of colonial influence. In a new legislative migration via Morocco in the 1960s, as applied at least to French-speaking or civil law countries, the judicial systems adopted in independent African states were strongly influenced by European judicial engineering. The major contextualising reforms of the post-independence decades were limited to the extension of judicial maps and a few attempts at indigenising justice systems to address local constraints.

Despite commendable efforts, national justice systems remain strongly influenced by colonial features such as the outward design of judicial policy, politicisation of the judicial system, strong Western - mainly European - political and philosophical influence, persistent

remoteness, funding and budgetary crisis, as well as excessive formalism at odds with local socio-cultural and economic paradigms.

One eccentric trend deserves attention: constitutional justice. While the 'ordinary justice system' may be perceived as the most colonised section of the justice systems due to the persistence of divine – now presidential or executive – devolution, the Prince is even more colonising in African constitutional justice systems. All things being equal, this is the reality of constitutional democracies on the continent. On this point, it is useful to refer to the almost inherent tendency of judiciaries to operate under an entrenched need for dependence. This posture can rightly be perceived as an inherent need to comply with the will of the power holder: God, the Prince,...the President. In such a context, independent judges are ostracised by their peers. They are dismissed, intimidated, threatened, or even killed.

As such, colonisation still largely informs justice, university teaching and the construction of the nation-state in Africa.

In attempting to understand the underlying reasons for this state of affairs, one inevitably has to deal with the impossible disconnect between the decolonisation of judicial systems and the independence of the judiciary, namely vis-à-vis the executive.

THE INESCAPABLE PARADIGM OF JUDICIAL INDEPENDENCE

In modern democracies, the executive branch of government is often prone to dominance over the two other branches, particularly the judiciary. The picture is no brighter in Africa where executive control of the judiciary is compounded by an obsession to secure a majority in parliament. While the stated purpose is to gather political support for executive action, the secret agenda is not only to silence opponents, including former allies who fell out with the ruling party, but also insubordinate judicial officers and paternalistic diplomats.

No serious political scientist can challenge the perennial executive control of the judiciary in African constitutional democracies. Evidence abounds in this regard, ranging from the composition and governance of the Francophone *Conseil Supérieur de la Magistrature* to its Anglophone counterpart, the Judicial Service Commission, with the judiciary often finding itself caught up between the executive and...the executive. This Herculean dilemma is exacerbated by the "power of the purse" and the constraint of the chancellery through which the executive holds the judiciary to its heartstrings, such as budget, discipline, and promotion, in short, ensuring its material, institutional, financial and moral dependence.

Recent attempts at judicial reform cannot be ignored. Laudable initiatives have aimed at closing the gap between the so-called civil law and Anglo-Saxon systems. Traditionally, judges from Anglophone Africa have been seen as more independent than their Francophone counterparts. A number of factors have forged this systematic interference by the executive in the operation of the judiciary in the French-speaking world, namely, the direct and massive involvement of the executive in the governance of the judiciary, including recruitment, training and appointments, the opportunity for interference by the executive in the discipline of judicial officers, the hierarchical relationship between the executive and the public prosecutor, and the financial dependence of the judiciary where the difficulty of breaking the budget cordon remains a key issue.

In response to this dilemma, countries with a civil law tradition such as the Democratic Republic of Congo, Côte d'Ivoire, Benin and Niger have recently undertaken reforms aimed

at ‘freeing’ the judiciary from the real or perceived grip of the executive branch. One of the most notable examples of this is undoubtedly the Congolese model, which emerged from a reform that re-established the Conseil supérieur de la magistrature – or the Judicial Service Council (JSC) – excluding all representatives of the executive branch, and whose presidency is entrusted to the President of the Constitutional Court. The irony is that the executive branch has not been deterred by the roadblocks that have been erected to protect the judiciary. In the case of *José Kabambi Alidor and Others v DRC* before the African Commission on Human and Peoples' Rights (ACHPR), the plaintiff challenged the decree by which the President of the Republic dismissed 96 judicial officers on the basis of the principle of parallelism of forms, given that he had appointed them, even though this was only a ratification of the recruitment process conducted exclusively by the judiciary. On the other hand, in the case of *Gerald Karuhanga v Attorney General* before the Constitutional Court of Uganda, the applicant complained that the President of the Republic had, against the advice of the Judicial Service Commission, appointed an outgoing President of the Supreme Court to succeed him under a common-law system where the executive is excluded from the governance of the judiciary. The Court found that a Chief Justice who has vacated office by reason of having attained the mandatory age of retirement is not eligible for re-appointment as Chief Justice of the Republic of Uganda; as such, the appointment violated the relevant provisions of the Constitution.

In other words, in Africa, much remains to be done to guarantee the independence of the judiciary through reforms that strengthen the separation of powers alone, which may, depending on the circumstances, turn out to be an academic exercise. It remains to be seen whether the Senegalese experience spearheaded by the Ousmane Sonko administration will make any difference in this regard.

THE DILEMMA OF ALTERNATIVES TO INTERNATIONAL JUSTICE

Both the law and doctrine tend to regard international justice as a palliative to domestic justice. The major principles enshrined in treaties in this respect include the rules of complementarity, subsidiarity, prior exhaustion of domestic remedies, *res judicata*, and *ne bis in idem*. Complementarity and subsidiarity largely apply to international human rights litigation and international criminal justice. The voluntary adherence of sovereign states to direct international engagement with other non-sovereign entities, in particular individuals, has been placed under strict scrutiny when it comes to litigation. The relatively recent advent of public international law explains this approach. When accepting individual procedures that are unprecedented in the history of international law, states have ensured that mechanisms are designed to guarantee their sovereignty. With regard to complementarity and subsidiarity, international courts will only exercise jurisdiction when the state concerned is unwilling or unable to resolve the legal issue raised or remedy the alleged violation.

The same is true of the principle of the exhaustion of domestic remedies. Numerous exceptions from case law applicable to various international regimes clearly show that international dispute-settlement forums obviously act as alternatives to weak domestic justice systems, especially those faced with the constant assaults of power-hungry executives and power struggles between international courts. This reality is illustrated by the Hissène Habré saga (*Yogogombaye v. Senegal*, African Court on Human and Peoples’ Rights (AfCHPR); *Belgium v. Senegal*, ICJ; *Habré v. Senegal*, ECOWAS Court of Justice), which culminated before the Extraordinary African Chambers, and the confrontations

between Africa and the International Criminal Court (ICC), which led to what is known as the “African Criminal Court” created under the terms of the so-called Malabo Protocol.

Regional courts in Africa have equally applied the principles of *res judicata* and *ne bis in idem*. In *Gombert v. Côte d'Ivoire*, the African Court held that the ECOWAS Court of Justice had already adjudicated the case brought by the applicant. It also held that the decision of the United Nations Human Rights Committee in *Johnson v. Ghana* was *res judicata*. As such, the African Court has acted as an alternative to the competent national and international bodies.

However, the interactions between African national courts and their international counterparts have not always been inspired by the law. The trust crisis between Africa and the ICC is enough of a wake-up call to anyone who is tempted to embrace the motto of ‘justice by Africans for Africans’ that was fast outdated by the “no-case” outcome before the ICC against the Kenyatta-Ruto electoral ticket. When, in 2014 in Malabo, member states of the Africa Union decided to renege on the international criminal order designed to put an end to the ignominious era of the Nuremberg Tribunals, it illustrated a case of astounding opportunism, one that does not shy away from affirming a legal and historical heresy by bringing back impunity wrapped in immunity under the guise of law. And this all occurred at a time when Africa had most expressly criminalised unconstitutional changes of government and adopted alternation in power and presidential term limits. Just as Africa expresses massive support for the punishment of international crimes, its leaders have made themselves immune as long as they remain in power. This only reveals a morally untenable stance.

In light of such a disturbing picture, the progress made in the field of human rights justice offers some consolation.

UNDENIABLE PROGRESS IN HUMAN RIGHTS JUSTICE

The massive failure of African regional human rights courts to enforce their decisions is well established. The assumption of effectiveness through judicialization, however, was not conclusive. From the pioneer quasi-judicial regional bodies of the 1980s to the fully fledged regional courts established in the 1990s, the judicial protection of human rights in Africa has not fared significantly better. It is largely considered that the political will of states remains the critical issue. In this regard, it cannot be overlooked that some states have challenged the jurisdictional features of the ACHPR. The Commission's independence crisis has further been compounded by the ‘African values’ saga, when the political organs of the African Union effectively imposed censorship on the observer status procedure for civil society organisations, particularly with regard to the rights of sexual minorities.

The disengagement of states from the AfCHPR is probably the most significant setback for the judicial guarantee of human rights on the continent. The recognition of the Court's jurisdiction by four new States (Tunisia, Gambia, Niger and Guinea Bissau) between 2017 and 2021 will unlikely suffice, in the short term, to mitigate the dramatic impact of the withdrawal of the four States (Rwanda, Tanzania, Benin and Côte d'Ivoire) that made up the largest part of the Court’s caseload between 2016 and 2020. Sub-regional bodies for the judicial protection of human rights have not been insulated from this engagement crisis. Illustrations abound of attacks against the ECOWAS Court of Justice and the East African Court of Justice, both of which have undergone regressive reforms to their mandates and

operations. The antagonism between African States' arguments on sovereignty and Africa's leading commitment to international justice as a shared value is striking.

Faced with this bleak picture, African citizens have every reason to despair. However, these challenges should not overshadow the undeniable progress made in the judicial protection of human rights in Africa. Firstly, the very existence of legal standards and judicial institutions empowered to hear allegations of violations of individual and collective rights by African States is unprecedented. Less than two decades ago, it was unthinkable for an ordinary African citizen to see a state held accountable for its actions before an independent African international tribunal. Secondly, a correlated achievement has been the establishment of human rights accountability at the regional level, with binding and enforceable decisions. Finally, Africa's human rights justice system has inaugurated peer accountability through inter-state litigation. The *DRC v. Rwanda* case, filed in 2023 before the African Court, raising allegations of atrocities in Eastern DRC, provides a unique opportunity to test interstate commitment to justice.

Another positive note worth mentioning is that some African states have not been insensitive to the dynamics in regional human rights bodies. The judgments of the ECOWAS Court of Justice in the cases of *Koraou v. Niger*, *Habré v. Senegal*, *Haidara v. Gambia*, *Njemanze v. Nigeria* have strengthened guarantees against modern slavery, impunity for international crimes, restrictions on freedom of expression and violence against women. The African Court contributed to the same dynamics with its judgments in *Mtikila v. Tanzania*, *Konaté v. Burkina Faso*, *APDH v. Côte d'Ivoire*, *IHRDA and APDF v. Mali*, *Rajabu v. Tanzania*, and *Ajavon v. Benin*. These decisions involve political participation, the decriminalisation of press offences, the independence of electoral bodies, gender equality, the mandatory death penalty, national consensus in the amendment of constitutions and the independence of the judiciary.

A recent development in relation to human rights justice in Africa concerns what may rightly be termed as the confrontation or war between judges.

THE JUDGES' WAR

Arm wrestling between judges is nothing new, though its manifestations have mainly been vertical. In reaction to the ruling of the International Court of Justice (ICJ) in the LaGrand case (*Germany v. USA*), the Supreme Court of the State of Arizona took the view that, unlike the US federal government, it did not recognise ICJ decisions to which it was not obliged to give effect. The Supreme or Constitutional Courts of Germany, Denmark, Hungary, Poland and Romania have openly defied the European Court of Human Rights (ECHR) by expressly declining to implement rulings of the Strasbourg judges. However, it is not ignored that the ECHR ultimately built its success on a dialogical approach with national judiciaries. A key example is the Strasbourg judges' conciliatory posture regarding compensation for wrongful convictions and hearsay evidence as adjudicated by the Supreme Court of the United Kingdom.

In Africa, while the executive branches of states have been more active in meting out attacks at regional courts, one recent trend is particularly worrying, namely, the defiance of national judges to their regional counterparts. In *CPD v Burkina Faso*, the Constitutional Court of Burkina Faso declined to recognize the ECOWAS Court of Justice ruling on the grounds that the executive had failed to give effect to the decision upholding the electoral code that

violated the right to participate in post-transition elections. In Decision DCC 20-434, the Constitutional Court of Benin declared all judgments handed down by the ECOWAS Court of Justice in respect of Benin as unconstitutional, null and void on the ground that the country had not incorporated the 2005 ECOWAS Court Protocol, which, under the regional integration doctrine, is directly applicable within the domestic sphere. Similarly, the Supreme Court of Senegal dismissed an application to suspend the ministerial decree implementing sponsorship of candidates for elections in the application of the ruling of the ECOWAS Court of Justice finding sponsorship in violation of the right to political participation. The national court's decision was based on the final and enforceable nature of the decisions of the Senegalese Constitutional Council, which had validated the sponsorship process. This “judges’ war” thus reveals an institutional confrontation instigated by the executive branches of states. However, the proxy war that ensues may as well amount to jurisdictional protectionism on the part of national courts.

A recent development is of interest in this regard. In early 2024, the ECOWAS Judicial Council spearheaded a proposal to introduce the requirement of the exhaustion of local remedies in proceedings before the Court of Justice. Notably, the ECOWAS Judicial Council is made up of Chief Justices of ECOWAS member states.

TRANSNATIONAL JUSTICE AND EMERGING CRIMES

There is no doubt that African leaders are aware of the rise of transnational crime on the continent. The provision for some of these crimes in the Malabo Protocol establishing an African international criminal regime is evidence of such awareness. Organised crime, cybercrime, environmental crime, money laundering, and drug trafficking – the so-called ‘new’ or emerging crimes – are on the rise in Africa. They are flourishing as a result of insufficient efforts to fight them, as illustrated through the little to no coordinated sanctions, given the new and changing nature of these cross-border offences. The structural complexity and complicity of government agents, combined with the legal vacuum on the issue, explain the rampant impunity for these crimes. An additional challenge is that they fall outside the traditional categorisation of national or international criminal offences.

The African Court judgment in *LIDHO and Others v Côte d'Ivoire* involving the dumping of toxic waste transported by the Probo Koala ship introduces the international punishment of these crimes into African regional litigation. The Arusha Court's ruling in this case stresses the challenges involved in holding multinational companies responsible, which is one of the complex aspects of accountability for emerging crimes.

The establishment of justice mechanisms to tackle these emerging crimes is both imperative and urgent, particularly as it informs Africa’s discourse on socioeconomic development. The issue of illicit financial flow resulting from grand corruption alone is sufficient proof of this. Additionally, this is not just a legal issue, it is also about countering the threat of disintegration hanging over fragile state-building in the region. This threat is fueled by serious infringements of the right to economic self-determination owing to the illegal and unsustainable exploitation of natural resources across the continent.

In conclusion, from an international perspective, Africa has made significant progress in advancing justice within the framework of the so-called third wave of democratisation. Despite this progress, challenges persist. Unfortunately, overcoming such challenges requires solutions deeply rooted in decolonisation, a process that has been slow to

materialise. Related issues also include insufficient contextualisation of the successes achieved elsewhere, incurable leadership crisis, and the resurgence of sterile populist rhetoric.

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